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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

BARRY BONDS,

Defendant.

No. CR 07-0732-SI

**UNITED STATES'S RESPONSE TO
DEFENDANT'S MOTION *IN LIMINE*
FIVE TO PROHIBIT EXPERT
OPINION TESTIMONY PURSUANT
TO RULE 16(a)(1)(G) (DOCKET #220)**

Date: March 1, 2011
Time: 2:00 p.m.
Judge: Honorable Susan Illston

INTRODUCTION

The defense has filed a motion seeking an order of the Court barring the government from offering expert testimony which was not disclosed to the defense pursuant to Fed. R. Crim. P. 16(a)(1)(G). As outlined below, the United States confirms its understanding of this rule and its intent to comply with its tenets.

FACTS

The United States timely complied with its expert disclosure requirements under Rule 16(a)(1)(G). On January 20, 2009, the government identified its expert witnesses, Dr. Don Catlin

1 and Dr. Larry Bowers, and provided their qualifications and summaries of their testimony. *See*
 2 Defense Exhibit A. In addition, the government has provided grand jury transcripts, lab reports,
 3 notes, documents, and other materials in discovery which provide the defense with considerable
 4 information regarding the anticipated testimony of these witnesses. Much of this additional
 5 discovery has been in the possession of the defense since at least 2008. The documents provided
 6 by the government have clearly and unambiguously informed the defense of the anticipated trial
 7 testimony of these witnesses, and contain within them the bases and reasons for any conclusions
 8 or opinions. As noticed in the January 20, 2009 summary letter, Dr. Catlin is expected to testify
 9 regarding his analysis of a urine sample which the government will show belonged to the
 10 defendant, and which contained anabolic steroids, that is tetrahydrogestrinone and exogenous
 11 testosterone, and clomiphene (brand name: Clomid), a so-called estrogen-blocker drug. Dr.
 12 Bowers will generally testify regarding anabolic steroids, human growth hormone, and other
 13 performance-enhancing drugs, the fact that they were illegal in 2003, their means of
 14 administration, side effects, and impact on athletic performance.

15 **ARGUMENT**

16 The defendant's motion plainly suggests that the government should be precluded from
 17 introducing a portion of its expert testimony. Indeed, its argument section begins by seizing
 18 upon the portion of Rule 16(d)(2)(C) which provides that the Court has the option of prohibiting
 19 the introduction of undisclosed evidence. The defense does not identify the information it fears
 20 may be improperly introduced. The defense does, however, indicate its intent to continue to file
 21 motions beyond the current deadline to continue to attempt to exclude portions of the anticipated
 22 testimony of Dr. Catlin and Dr. Bowers.

23 The government is fully aware of its obligations under Rule 16(a)(1)(G). The
 24 considerable discovery provided by the government as to both witnesses far exceeds its
 25 disclosure obligations. The government will also continue to comply with its obligations. To the
 26 extent, however, that the defense motion is attempting to suggest that the government's expert
 27 testimony is circumscribed by the precise text of its summary, the defense argument is misplaced.

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1 As the Hon. William H. Alsup of this Court recently observed, “Rule 16(a)(1)(G) does
 2 not require recitation of the chapter and verse of the experts’ opinions, bases and reasons. No
 3 rule, statute or decision necessitates such comprehensive disclosure.” *United States v. Cerna*,
 4 No. Cr 08-0730 WHA, 2010 WL 2347406, at *2 (N.D.Cal. June 8, 2010). In finding the
 5 government’s expert summary sufficient, Judge Alsup observed: “[t]he government has provided
 6 adequate bases and reasons as to [the witness] for counsel to frame a *Daubert* motion or other
 7 motion in limine, to prepare for cross-examination, and to allow a possible counter-expert to
 8 meet the purport of the case-in-chief testimony. This is sufficient to meet the government’s
 9 obligations under Rule 16(a)(1)(G).” *Id.*; see *United States v. Basinger*, 60 F.3d 1400, 1407 (9th
 10 Cir. 1995); see also *United States v. Nacchio*, 555 F.3d 1234, 1262 (10th Cir. 2009) (en banc)
 11 (McConnell, J., dissenting) (observing that Rule 16’s requirement of written summary “falls far
 12 short of the ‘complete statement’ requirement of litigants in civil cases” per Fed. R. Civ. P.
 13 26(a)(2)(B)(i)).

14 The purpose of Rule 16(a)(1)(G) is “to minimize surprise that often results from
 15 unexpected expert testimony, reduce the need for continuances, and to provide the opponent with
 16 a fair opportunity to test the merit of the expert’s testimony through focused cross-examination.”
 17 Fed. R. Crim. P. 16, 1993 Amend. Advisory Committee Note. In general, the purposes of the
 18 rule are to require identification of experts and the subject of their expected testimony. The
 19 government’s disclosures, which include material above and beyond the requirements of Rule 16,
 20 are in compliance with the Rule.

21 The government does not anticipate a disclosure issue in this case. However, the
 22 government’s full discovery regarding its experts suggests that exclusion would be inappropriate
 23 in this case if any disclosure issue arose. The government has endeavored in good faith to
 24 comply with its disclosure requirements, and is not attempting to “hide the ball” with respect to
 25 its expert disclosures for the purpose of tactical advantage. Exclusion is an appropriate remedy
 26 for a discovery rule violation only where “the omission was willful and motivated by a desire to
 27 gain a tactical advantage.” *Taylor v. Illinois*, 484 U.S. 400, 415 (1988). Even in cases where a
 28 disclosure violation occurred on the basis of alleged failure to give notice, exclusion of the entire

1 testimony of the expert is too harsh a remedy, particularly where the omission was not willful,
 2 the omission was not done to gain a tactical advantage, the general basis of the expert's
 3 testimony was disclosed, and the expert's testimony was essential. *See United States v. Finley*,
 4 301 F.3d 1000, 1016-18 (9th Cir. 2008) (finding district court improperly excluded defendant's
 5 expert witness as sanction where Rule 16 disclosure "may not have been as full and complete as
 6 it could have been or as the government would have liked," and that exclusion would have been
 7 "a too harsh remedy" even had there been violation of Rule 16).

8 The government believes that it is in full compliance with its discovery obligations. In
 9 addition, there will likely be no prejudice in this case. To the extent the instant motion may be
 10 interpreted as the defense identifying an incomplete area of expert disclosure, the motion
 11 indicates the defense is aware of the deficiency, and is sufficiently comfortable to use this
 12 deficiency as a tactical advantage, rather than simply raising it with the Court and counsel.
 13 Actual prejudice is therefore very unlikely.

14 CONCLUSION

15 The government herein acknowledges its obligations under Rule 16(a)(1)(G) and its
 16 ongoing obligation to comply with its tenets.

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 18 DATED: February 22, 2011

Respectfully submitted,

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22 /s/
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